Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

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_____ Term, 1994

No. _____

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GLENN D. THESENVITZ, et al,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al,

Respondents.

_____

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

_____

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36 pp

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## QUESTIONS PRESENTED FOR REVIEW

1. Can participants and beneficiaries in an ERISA-covered employee benefit pension plan obtain any relief from the administrator of the plan under an ERISA-based federal common law

equitable estoppel theory because of misrepresentations that were made to them by the plan administrator, which they reasonably and irrevocably relied upon to their detriment, concerning the amount of benefits that they were entitled to receive under the plan?

2. Aside from or in concert with the federal common law that is or should be developed under ERISA, do any specific ERISA statutes, such as 29 USC §1132 or 29 USC §1109, give rise to an equitable estoppel claim under ERISA given the factual situation that is presented herein?

## PARTIES TO THIS PROCEEDING

Petitioners herein are: Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberline, James E. Berwick, Donald E. Palmer, Ferrin K. Walker, and Norma

Stark, as PR of the Estate of Lawrence R. Stark (Thesenvitz, et al).

Respondents herein are: Kaiser Engineers Hanford Company, Kaiser Engineers Hanford Company Retirement Plan and The Administrative Committee for Kaiser Engineers Hanford Company Retirement Plan (Kaiser).

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## GROUNDS FOR JURISDICTION

The instant Petition was filed with this Court within ninety days of the date upon which the United States Court of Appeals for the Ninth Circuit denied the petitioners' Petition for Rehearing With A Suggestion for Rehearing En Banc, on April 26, 1994, as provided for by the rules of this Court. (See U.S. Supreme Court Rule 13). By means of this Petition, petitioners are seeking review of this denial of their Petition for Rehearing by the Ninth Circuit, as well as review of the underlying February 8, 1994 decision of the Ninth Circuit which reversed and remanded the judgment that had been entered by the U.S. District Court for the Eastern District of Washington in favor of the petitioners herein on July 9, 1992. This Court's

jurisdiction is invoked under 28 USC §1254.

## PERTINENT STATUTES

The pertinent portions of ERISA are set forth fully in the Appendix attached hereto, as are the jurisdictional statutes referred to herein.

## STATEMENT OF THE CASE

Petitioners based this action upon ERISA (29 USC §1001 et. seq.), and upon the federal common law principles of equitable estoppel that had been developed under ERISA by the 9th Circuit Court of Appeals at the time when this lawsuit was commenced. (See Appendix A, pp. 109-123). The U.S. District Court

for the Eastern District of Washington therefore had jurisdiction over this matter pursuant to 28 USC §1331, and/or 29 USC §1132. (A 108-122; A 17).

Each of the petitioners herein, except for Norma Stark, are former employees of both the Kaiser Engineers Hanford Co. (KEH) and the J.A. Jones Company (Jones). (A 108-122; A 18). Petitioner Norma Stark is bringing the instant lawsuit as the representative of the estate of her deceased husband, Larry Stark, who was otherwise similarly situated to the other plaintiffs herein for the purposes of this lawsuit. (A 108-122; A 16). Future references to "the petitioners" in this brief will be intended to include Mr. Stark and Ms. Stark.

Petitioners' claim in this matter is based upon a set of facts which even the defendants' own witnesses and managers at

trial called "devastating" and "shocking". Petitioners were induced to retire from KEH's employment, at a time when they did not have to do so, by interpretations of KEH's pension plan that were made to them by authorized representatives of the plan administrator. (A 108-122; A 18-24). These interpretations of the KEH pension plan included supplying the petitioners with specific, written statements as to the amount of monthly pension benefits that they would receive under the plan if they chose to take advantage of an early retirement program that KEH was offering only for a limited time. (Id.) Justifiably relying upon the above-described interpretations of the KEH pension plan, the petitioners all agreed to retire from KEH's employment on or before March 31, 1989 as part of this early retirement program. (A 108-122; A

18-24; A 33-37).

In addition to being induced into retiring at a time when they did not have to do so, the petitioners also all detrimentally relied upon the above-described representations that had been made to them by the plan administrator in several other significant respects as well (i.e., they irrevocably chose to receive early Social Security benefits, which permanently reduced the amount of monthly benefits that they would receive during their lifetimes; they made significant purchases in anticipation of a retirement-oriented lifestyle; they moved to different cities, etc.). (Id; A 41).

For over a year after their retirement, the petitioners did in fact receive the amount of monthly pension benefits under KEH's pension plan that they had been promised. (A 108-122; A

23). However, in May of 1990, the petitioners were informed for the first time by the KEH plan administrator that a "mistake" had allegedly been made, and that in order to correct this "mistake", the petitioners' monthly pension benefits under the KEH pension plan were going to be reduced immediately and permanently by as much as $1,000.00 per month. (A 23-24; A 108-122). The source of this mistake allegedly was a miscalculation that had occurred when the benefits that the petitioners had received under the pension plan of a former employer, J.A. Jones, Inc., which had been transferred over to the KEH pension plan when the petitioners became KEH employees, were being determined by the KEH plan administrator in connection with the petitioners' early retirement. (A 12-25). Since May of 1990, the KEH pension plan administrator has in fact

drastically reduced each one of the petitioners' monthly pension benefits under the KEH pension plan as a result of this "mistake". (A 23-24).

District Court Judge Fred Van Sickle determined that the principles of equitable estoppel that were applicable to this matter under the federal common law of ERISA, and that had been enunciated by the Ninth Circuit Court of Appeals as well as by other Courts of Appeals on numerous previous occasions, would not allow the KEH pension plan administrator to deprive the petitioners of the pension plan benefits that they had been promised, which they had been receiving, and which they were counting on. (A 25-47; A 13-14; A 49-51). The Ninth Circuit Court of Appeals reversed, solely on the basis that this Court's recent decision in Mertens v. Hewitt Associates, 508 U.S. _____, 124, L.Ed.2d

161, 1135 S.Ct. 2063 (1993) allegedly prohibited any cause of action utilizing equitable estoppel principles under ERISA from being pursued based upon the circumstances presented herein, without reaching any other issues. (A 2-12). The Ninth Circuit reached this result based upon the decision that it had just rendered in Watkins v. WHC, 17 EBC 1990 (9th Cir., 1993). (A 2-12; A 52-107). This timely Petition has followed.

## ARGUMENT

### A. CERTIORARI SHOULD BE GRANTED IN THIS INSTANCE IN ORDER TO CLARIFY MERTENS AND BECAUSE OF CONFLICTS AMONG THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE.

As set forth below, some Circuit Courts of Appeals allow federal common law equitable estoppel claims to be

brought under ERISA under some circumstances; some Circuit Courts do not allow such claims to be brought under any circumstances. Amongst those Circuit Courts that do allow ERISA-based equitable estoppel claims to be pursued, there are significant differences of opinion as to when and under what circumstances this can occur, although case law developed in the Eleventh Circuit appears to be emerging as the majority view on this issue. Some of the specific decisions of the various Circuit Courts of Appeals on this issue are set forth below:

Law v. Ernst & Young, 956 F.2d 364 (1st Cir., 1992) (First Circuit applied 11th Circuit's approach to dealing with ERISA-based equitable estoppel claims, without explicitly adopting that approach.)

Lee v. Burkhart, 991 F.2d 1004 (2nd

Cir., 1993) (Second Circuit held that an ERISA-based equitable estoppel claim was available under federal common law of ERISA but only in "extraordinary circumstances" involving affirmative misrepresentations.)

Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3rd Cir., 1993) (In factual situation remarkably similar to the instant matter, Third Circuit held that relief in the form of equitable estoppel was available under federal common law of ERISA for plaintiffs who had been victims of misrepresentations by representatives of pension plan administrator which plaintiffs had relied upon to their detriment.)

Crosby v. Crosby, 986 F.2d 79 (4th Cir., 1993) (under ERISA, federal courts may develop common law to grant "appropriate equitable relief").

Williams v. Bridgestone/Firestone,

Inc., 954 F.2d. 1070 (5th Cir., 1992) (holds based on earlier decisions that ERISA-based equitable estoppel claim based upon oral misrepresentations is not cognizable, considers but refuses to rule on issue of whether 11th Circuit is correct in holding that ERISA-based equitable estoppel claims are available under other circumstances).

Tregoning v. American Community Mutual Ins. Co., 12 F.3d 79 (6th Cir., 1993); (ERISA-based equitable estoppel claim available under federal common law of contracts and 29 USC §1132(a)(3)(B)); see also Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir., 1991) (equitable estoppel relief available under ERISA, even based upon oral misrepresentations that would modify terms of written plan, if actuarial soundness of benefit plan funds would not be impacted by such relief).

Cutting v. Jerome Foods, Inc., 993 F.2d 1293 (7th Cir., 1993) (federal courts have authority to create common law under ERISA but it is uncertain whether common law remedies such as equitable estoppel are available under ERISA); Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir., 1990) (estoppel principles applied to single-employer unfunded welfare plan).

See Slice v. Sons of Norway, 978 F.2d 1045 (8th Cir., 1992) (8th Circuit discusses possible application of equitable estoppel principles to ERISA cases, but declines to rule in that regard because of division on this issue amongst the circuits, and remands to District Court).

Alexander v. Anheuser-Busch Companies, Inc., 990 F.2d 536 (10th Cir., 1993) (coverage of ERISA plan may not be enlarged by informal oral or written

communications under a theory of federal common law estoppel).

Novak v. Irwin Yacht and Marine Corp., 986 F.2d 468 (11th Cir., 1993) (ERISA-based federal common law equitable estoppel claim not available in cases involving "oral amendments to or modifications of employee benefit plans" but is available when authorized representatives of the plan administrator make interpretations of ambiguous language contained in plan documents to plan participants that those participants have detrimentally relied upon; this approach is consistent with pre-Watkins law in the 9th Circuit (see Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d. 812 (9th Cir., 1992) and elsewhere).

To date, the petitioners are not aware of any other court that has held that, as a result of Mertens there can be

no claims made by plan participants for equitable estoppel relief under the federal common law of ERISA. The petitioners believe that this is not surprising, since, in their view, Mertens does not in fact stand for this proposition at all. In fact, several other courts have interpreted Mertens in a far different manner than has the Ninth Circuit. See Anweiler v. American Elec. Power Service Corp., 3 F.3d 986, 993 (7th Cir., 1993) (interprets Mertens as broadening scope of equitable relief available against fiduciaries under ERISA, and in particular, under 29 USC §1132(a)(3)); see also Harris Trust and Sav. Bank v. Salomon Bros., Inc., 832 F.Supp. 1169, 1173 (N.D. Ill., 1993) and Airparts Co. v. Custom Ben. Services of Austin, 828 F.Supp. 870, 875-6 (D. Kan., 1993) (both interpreting Mertens as applying only to claims against non-

fiduciaries, and even then, as not precluding equitable estoppel relief, but rather, as simply preventing recovery of compensatory money damages against such non-fiduciaries under some ERISA provisions; restitution, which can take form of money, and "other equitable relief" still recoverable against both non-fiduciaries and fiduciaries).

B. THE NINTH CIRCUIT HAS MISINTERPRETED MERTENS.

Petitioners respectfully submit that, in Mertens, this Court simply determined that the remedy of compensatory monetary damages was not available to the plaintiffs in that case against an entity that was a non-fiduciary for the purposes of ERISA under the circumstances that were presented therein, and that the Ninth Circuit Court

of Appeals, in holding that Mertens stands for a broader proposition, has misinterpreted this Court's holding in Mertens, a misinterpretation which, if it was allowed to stand unaltered, could wreak havoc upon the many cases involving ERISA-based equitable estoppel-type claims that are currently wending their way through the federal court system. Mertens, supra, at 174.

Moreover, the petitioners also respectfully submit that, in Mertens, this Court also made it clear in dicta that compensatory monetary damages would be available to ERISA plan participants and beneficiaries in appropriate instances when they brought suit against entities that were fiduciaries for the purposes of ERISA:

> " . . . (ERISA) . . . provides that not only the persons named as beneficiaries by a benefit plan . . . but also anyone else who exercises discretionary

> control or authority over the plan's management, administration, or assets . . . is an ERISA 'fiduciary'." Mertens, supra, at 167.
>
> "ERISA . . . defines 'fiduciary' not in terms of a formal trusteeship, but in functional terms of control and authority over the plan . . . thus expanding the universe of persons subject to fiduciary duties - and to damages - under §409(a). . . . (Entities) . . . become liable for damages when they cross the line . . . (and become a) . . . fiduciary . . ." Mertens, supra, at 174.
>
> "All that ERISA has eliminated . . . is the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." (Id).

In the instant matter, the trial court awarded a judgment for the petitioners herein against KEH because of actions which KEH took while KEH was acting in the capacity of plan administrator for the pension plan in question. (A 17; A 37; 40. A review of

the trial court's decision herein also clearly reveals that the trial court considered KEH, as the plan administrator in this instance, to have been acting in the capacity of a "fiduciary" for the purposes of ERISA with respect to the plaintiffs herein, and that KEH did in fact act in that capacity in this instance under the Mertens definition of an ERISA fiduciary. (A 17; A 25; A 29-32; A 37-40). Mertens, supra, at 167, 174.

The petitioners respectfully submit that the trial court's decision in this regard is therefore, if anything, both consistent with and supported by the above-referenced dicta in Mertens, because in this instance the petitioners had obtained a money judgment against an entity (KEH) that was an ERISA "fiduciary" and that had the power to control the actions of the benefit plan

in question herein, and did in fact control those actions in a manner that was extremely detrimental to the petitioners. (Id.) KEH was therefore clearly liable to the petitioners herein under the Mertens dicta referred to above pursuant to ERISA for monetary damages in this instance. Mertens, supra, at 167, 174.

Additionally, petitioners respectfully submit that an examination of this Court's decision in Mertens makes it clear that, if anything, this Court specifically reserved making any ruling upon the particular issue that would be determinative in this case, namely, regarding the question of what sort of equitable remedial relief is available to plan participants under ERISA under circumstances such as those presented herein because the Court did not believe that the parties in Mertens had

adequately addressed the issue. Mertens, supra, at 168-9. Thus, petitioners respectfully submit that the Ninth Circuit clearly misinterpreted Mertens in holding that the Mertens Court did determine whether equitable estoppel relief was available under ERISA under circumstances such as those presented herein. (Id).

However, although petitioners believe that Mertens did not definitively answer this question, guidance from this Court to the Courts of Appeals on this issue is clearly needed, as is evidenced by the large volume of cases on this issue that are currently reaching the Courts of Appeals, and by the diverse determinations that the Courts of Appeals are rendering in those cases, as has been described earlier in this Petition. Petitioners respectfully submit that, by granting certiorari in the instant

matter, the Court could provide that guidance, and could also decide an important question of federal law, and the petitioners respectfully urge the Court to do so. (See U.S. Supreme Court Rule 10(1)(a) and (c)).

C. THE PETITIONERS WERE CLEARLY ENTITLED TO RELIEF HEREIN UNDER PRE-WATKINS NINTH CIRCUIT CASE LAW CONCERNING ERISA-BASED EQUITABLE ESTOPPEL.

At the time when the petitioners commenced this lawsuit, the principal decisions of the Ninth Circuit Court of Appeals which addressed the subject of ERISA-based equitable estoppel claims were Ellenburg v. Brockway, Inc., 763 F.2d 1091 (9th Cir., 1985), Davidian v. Southern California Meat Cutter's Union and Food Employees Benefit Fund, 859 F.2d 134 (9th Cir., 1988), and Dockray v. Phelps Dodge Corp., 801 F.2d 1149 (9th

Cir., 1986).

The Ninth Circuit had held in these decisions that plaintiffs could successfully bring equitable estoppel claims against employee benefit plan administrators pursuant to the federal common law of ERISA as long as they were able to establish the following elements: 1) the party to be estopped knew the facts; 2) the party to be estopped intended that his conduct would be acted on or he acted so that the party asserting the estoppel had a right to believe that he intended his conduct to be acted on; 3) the party asserting the estoppel claim was ignorant of the true facts; and 4) the party asserting the estoppel claim relied on the other party's conduct to his injury. Ellenburg, supra, at 1096; Davidian, supra, at 136; Dockray, supra.

Judge Van Sickle correctly

determined as his well-reasoned opinion contained in the Appendix herein indicates, that the petitioners in this matter had satisfied each of the above-referenced four elements of an ERISA-based federal common law equitable estoppel claim in this instance, and that therefore, they were entitled to receive appropriate relief from defendant KEH in its capacity as the administrator of the pension plan in question. (A 18-40). Judge Van Sickle was also careful to order relief against KEH as the plan administrator rather than against the plan itself in order to avoid impacting the actuarial soundness of the plan. (A 37-40).

While this matter was pending on KEH's appeal to the Ninth Circuit, the Ninth Circuit decided Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir., 1992).

The Greany court took pains to stress that its decision was not meant to alter in any way the existing elements of an ERISA-based federal common law equitable estoppel claim, but rather, was intended simply to add two additional and, at least in the 9th Circuit, new elements to such a claim. Greany, supra, at 822, n. 9.

According to the Greany court, a plaintiff who was seeking to bring an ERISA-based equitable estoppel claim would have to initially establish that: 1) a provision in the governing plan document was ambiguous; and 2) the party to be estopped had interpreted this ambiguity as part of the conduct upon which the equitable estoppel claim was based. (Id). The Greany court specifically indicated that:

> "If these requirements are satisfied, the plaintiff may proceed with the equitable

> estoppel claim by satisfying the precise situational factors set forth in Ellenburg."

(Id).

The Ninth Circuit cited favorably to several decisions of the Eleventh Circuit Court of Appeals in deciding to adopt this revised approach to ERISA-based equitable estoppel claims. Greany, supra, at 821-822.

It is also clear that the petitioners herein were entitled to prevail against KEH in this matter based upon their equitable estoppel claim even under the new Greany standard, because material ambiguities clearly did exist in the governing plan document which was applicable in this instance and because those ambiguities were in fact interpreted by the plan administrator in this instance as part of the conduct giving rise to the petitioners' ERISA-based common law equitable estoppel

claim. (Greany, supra, at 822; A 19-41). Specifically, the plan administrator in this instance interpreted and applied complex plan documents which set forth ambiguously the method by which the petitioners were to receive credit for their prior employment with J.A. Jones, Inc. when their KEH pension plan benefits were being calculated in connection with their early retirements. (A 18-40).

Thus, under pre-Watkins Ninth Circuit case law, the petitioners would clearly have been entitled to prevail in this matter, and it is only the Ninth Circuit's interpretation of this Court's Mertens decision which has prevented the petitioners from doing so to date. The petitioners believe that they are clearly entitled to prevail in this instance under ERISA. If the Ninth Circuit's decision in this matter was allowed to stand, a statutory scheme that was

designed to protect participants in and beneficiaries of employee benefit plans (see 29 USC §1001) would be held to allow in this instance for what could aptly be characterized as a "betrayal without remedy". Therefore, the petitioners respectfully request this Court to grant their Petition for Certiorari in this instance in order to review the Ninth Circuit's interpretation of Mertens, and in order to provide guidance to all of the Circuit Courts of Appeals on the important issue of federal law that is presented herein. (See U.S. Supreme Court Rule 10).

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